

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION

IN RE:

DEXTER DAY GILBERT,

Debtor.

CASE NO.: 18-40399-KKS

CHAPTER: 7

NUTRIEN AG SOLUTIONS, INC.  
F/K/A CROP PRODUCTION  
SERVICES, INC.,

ADV. NO.: 18-04023-KKS

Plaintiff,

v.

DEXTER DAY GILBERT,

Defendant.

**ORDER DENYING, AS MOOT, DEFENDANT'S MOTION TO  
DISMISS SECOND AMENDED COMPLAINT (DOC. 46)**

THIS MATTER is before the Court on *Defendant's Motion to Dismiss Second Amended Complaint* ("Motion," Doc. 46), to which the Plaintiff filed a response.<sup>1</sup> Having reviewed the pleadings, relevant case law, and applicable Bankruptcy Code and Rules, the Motion is due to be denied, as moot, with leave for Defendant to amend his Answer.

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<sup>1</sup> Doc. 49.

## **BACKGROUND**

On December 6, 2018, Plaintiff, Nutrien Ag Solutions, Inc. f/k/a Crop Production Services, Inc., commenced this Adversary Proceeding by filing a complaint, and then an amended complaint.<sup>2</sup> On February 12, 2019, Defendant filed a motion to dismiss that complaint.<sup>3</sup> The Court granted that motion, with leave for Plaintiff to amend.<sup>4</sup>

On May 5, 2019, Plaintiff filed its *Second Amended Complaint*, seeking a ruling that debt owed by the Defendant is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(2) and 523(a)(6).<sup>5</sup> On May 20, 2019, Defendant filed an answer to that Complaint, and contemporaneously filed the instant Motion.<sup>6</sup>

## **DISCUSSION**

**The Motion is moot because Defendant contemporaneously filed the Answer.**

Defendant does not cite any of the seven (7) enumerated defenses under Rule 12(b) of the Federal Rules of Civil Procedure in the Motion, but it appears that Defendant intends the Motion as one to dismiss under

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<sup>2</sup> Docs. 1 & 3.

<sup>3</sup> Docs. 15 & 26.

<sup>4</sup> Doc. 36.

<sup>5</sup> Doc. 43.

<sup>6</sup> *Def.'s Answer to Second Am. Compl.* ("Answer"). Doc. 45.

Rule 12(b)(6).<sup>7</sup>

Pursuant to Rule 12(b), “[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.... A motion asserting any of [the] defenses must be made before pleading if a responsive pleading is allowed.”<sup>8</sup> Accordingly, a Rule 12(b) defense must either be raised before a responsive pleading via motion or included in the responsive pleading itself.

The Eleventh Circuit has found that a motion to dismiss becomes improper once a responsive pleading has been filed.<sup>9</sup> Additionally, “[a]n Answer filed contemporaneously with the filing of a Motion to Dismiss renders the motion moot and makes it ‘procedurally impossible for the Court to rule on the motion to dismiss.’”<sup>10</sup> “It is technically impossible to challenge the sufficiency of an allegation in a complaint, as one does in a motion to dismiss, while simultaneously admitting or denying the same allegation, as one does in an answer.”<sup>11</sup> Because the Defendant

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<sup>7</sup> Fed. R. Bankr. P. 7012(b) makes Fed. R. Civ. P. 12(b) applicable in adversary proceedings.

<sup>8</sup> *Id.*

<sup>9</sup> *Skrtich v. Thornton*, 280 F.3d 1295, 1306 (11th Cir. 2002).

<sup>10</sup> *Capitol Preferred Ins. Co. v. Whirlpool Corp.*, Case No. 2:13-cv-868-FtM-29UAM, 2013 WL 12156450, \*1 (M.D. Fla. 2013); *See also Brisk v. City of Miami Beach, Fla.*, 709 F. Supp. 1146, 1147 (S.D. Fla. 1989) (finding “[u]nder the unambiguous, mandatory language of Rule 12(b), a motion to dismiss must be made before an answer is filed.”).

<sup>11</sup> *Boat Raising and Reclamation v. Victory, a 56’ Dania Custom Boat*, Case No. 2:06-cv-78-FtM-29DNF, 2007 WL 9718694, \*1 (M.D. Fla. 2007).

contemporaneously filed the Motion along with Answer, the Motion is moot.

For the reasons stated, it is

ORDERED:

1. *Defendant's Motion to Dismiss Second Amended Complaint* (Doc. 46) is DENIED, as moot.
2. Defendant shall have fourteen (14) days from the date of this Order within which to file and serve an amended answer, if Defendant wishes to incorporate any affirmative defenses that may have otherwise been set forth in the Motion.
3. The hearing currently scheduled for June 20, 2019 is CANCELLED.

DONE and ORDERED on June 18, 2019.



KAREN K. SPECIE  
Chief U.S. Bankruptcy Judge

Defendant's attorney is directed to serve a copy of this Order on interested parties and to file a Proof of Service within three (3) days of entry of this Order.